No. 6123

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STEVE STANWORTH and
MRS. STEVE STANWORTH,
Appellants.

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska. Division Number One.

Brief of Appellee

HOWARD D. STABLER,
United States Attorney,
For Appellee.

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Brief of Appellee

STATEMENT OF CASE

In this case appellants, hereinafter called defendants, were jointly charged with violation of the prohibition laws by indictment in two counts whereof (Trans. pp. 1, 2) the first count charged unlawful possession of intoxicating liquor in violation of the Alaska Bone Dry Act (39 Stat. 903, Chapter 53; 48 U. S. C. A. 261) and the second count charged the keeping of a liquor nuisance in violation of The National Prohibition Act.

The defendants were jointly tried and convicted of possessing intoxicating liquor in violation of the Alaska Bone Dry Act. (Trans. pp. 13, 14) as charged in count one of the indictment; and they were both acquitted of keeping the liquor nuisance as charged in count two of the indictment. They have both appealed from the conviction under count one to this court.

THE MOTION TO DISMISS THE APPEAL.

Appellee, on or about October 1, 1930, filed in this court a motion to dismiss the appeal for want of appellate jurisdiction. The motion was duly served upon counsel of record for the appellants. It is as follows:

> "Comes now United States of America, appellee in the above entitled court and cause, by Howard D. Stabler, United States Attorney for the First Division, District of Alaska, and by virtue of the provisions of the third subdivision of Section 128 of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 225, U. S. Comp. Stat. 1120, as amended, respectfully moves the court to dismiss for want of appellate jurisdiction the above entitled pretended appeal of Steve Stanworth et ux., versus United States of America, No. 6123, from the final judgment (pp. 16, 17, 18 Trans.) of the District Court for the First Division, District of Alaska, for

the reason that the Constitution of the United States, nor any statute or treaty of the United States, or any authority exercised thereunder, is not involved; the value in controversy exclusive of interest and costs does not exceed One Thousand ($1000.00) Dollars; the offense charged is not punishable by imprisonment for a term exceeding one year or by death; and said proceeding is not a habeas corpus proceeding."

ARGUMENT ON MOTION TO DISMISS

Upon authority of the case of Starklof versus U. S., 20 Fed. (2d) 32, decided by this court in 1927, the appeal ought to be dismissed.

The statute which defines the crime whereof the defendants were convicted is Section One of the Alaska Bone Dry Act enacted by Congress for the Territory of Alaska. It is not a statute of the United States as contemplated by the third subdivision of the statute (28 U. S. C. A. 225) fixing the appellate jurisdiction in cases from Alaska.

In the Starklof case the court held that an act of the territorial legislature is a law of the territory and not a law of the United States.

In the case of Abbate v. U. S., 270 F. 735, this court said:

"In legislating for a territory Congress exercises the combined powers of a national and state government. The Bone Dry Law of Alaska stands upon the same footing it

> would have had it been enacted by a territorial legislature created by Congress."

Nor is the offense charged punishable by imprisonment for a term exceeding one year or by death. The maximum punishment which could be imposed for the crime whereof the defendants were charged and convicted is not more than one year's imprisonment and $1000.00 fine, or both (48 U. S. C. A. 261).

The case is not a habeas corpus proceeding. No treaty, or authority exercised thereunder, is involved. Nor is any constitutional question involved. The only matter in the case which might refer to the Constitution is found on pages 19, 20, 116 and 117 of the transcript, the substance whereof is shown by the following found on page 19:

> "We object to any further evidence as to what he did under a search warrant, he having testified that he had a search warrant, until it has been shown to the court it is a valid search warrant based on sufficient evidence."

We think the question involved by the objection cannot be construed as a constitutional question. The words "Constitution is involved" found in the Act of February 13, 1925, (28 U. S. C. A. 225) have been used in other statutes, and have often been construed by the courts.

In Ansbro v. U. S., 159 U. S. 695, 697, 698, 16 Sup. Ct. 187, the Supreme Court of the United States by Mr. Chief Justice Fuller said:

> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such claim by its decision."
>
> See also Sugerman v. U. S., 249 U. S. 182, 183, 184, 39 Sup. Ct. 191,
> Itow v. U. S., 233 U. S. 581, 584, 34 Sup. Ct. 699,
>
> State of Arkansas v. Schlurholz, 179 U. S. 598, 21 Sup. Ct. 229, 231,
> 25 Corpus Juris 913, section 263."

It is respectfully submitted that by virtue of the provisions of the Act of February 13, 1925, (28 U. S. C. A. 225) the court has not jurisdiction to review the case on appeal; and, therefore, the appeal ought to be dismissed.

ARGUMENT ON THE MERITS.

Defendants contend their Motion in Arrest of Judgment (Trans. pp. 111, 113), based upon the

statutory ground (Sections 2199, 2282 Compiled Laws of Alaska) "that the facts stated do not constitute a crime," raises an issue which gives this court appellate jurisdiction to review their case.

This contention is grounded upon the following conclusions: The indictment does not state a crime because it charges possession of intoxicating liquor in violation of the Alaska Bone Dry Act which is repealed, at least as far as possession of intoxicating liquor is concerned, by the National Prohibition Act; and the Alaska Bone Dry Act is a statute of the United States within the meaning of the Act of February 13, 1925 (28 U. S. C. A. 225); therefore, the court has appellate jurisdiction to review their case.

In appellee's argument on the Motion to Dismiss the Appeal for want of appellate jurisdiction, the point was made that the Alaska Bone Dry Act is not a statute of the United States within the meaning of the Act of February 13, 1925.

Defendants, however, with considerable confidence, assert it is, and with equal confidence contend their Motion in Arrest of Judgment is sufficient to get the case before the court for review upon the merits.

A review of the case on the merits will show defendants' arguments untenable.

It is well settled the Alaska Bone Dry Act was

not repealed by the National Prohibition Act. Every point raised by defendants has been before the court; and it should not be necessary for appellee to do more than call the court's attention to cases wherein defendants' arguments are refuted.

In Abbate v. U. S., 270 F. 735 (CCA-9) decided in 1921, Abbate was convicted of possessing intoxicating liquor in violation of the Alaska Bone Dry Act, and a sentence of three months in jail and a fine of $800.00 was imposed. The contention was made in this court, as is now made again, that because the maximum punishment for illegal possession of intoxicating liquor under the National Act was only $500.00 fine for a first offense, the Bone Dry Act was repealed. The court affirmed the conviction under the Alaska Dry Act.

When the case of Koppitz v. U. S., 272 F. 96, (CCA-9), decided later in 1921, came before the court, the court said the objection that the Alaska Bone Dry Act was repealed by the National Prohibition Act was not well founded.

In 1923, the question again came before the court in Simpson v. U. S. 290 F. 963 (CCA-9) (Cer den. 263 U. S. 707). In an opinion written by Judge Rudkin the court said:

> "The validity of the Alaska Bone Dry Act has been twice affirmed by this court, and the question is no longer an open one here."

The effect of the Supplemental Act to the Na-

tional Prohibition Act on the Alaska Dry Law was considered by the court in 1924 in the case of Peterson v. U. S. (CCA-9) 297 F. 1000, 1001. In the opinion written by Judge Hunt, the court said:

> "The provisions of the supplemental act do not repeal the Alaska dry law. The two laws, National Prohibition Act and Alaska dry law, are in force in Alaska, with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail."

In 1926, the matter came before the court again in U. S. v. Berkness, 16 F. (2d) 115, (CCA-9) upon the point of whether a search warrant issued under the Alaska dry act for a private dwelling was sufficient. The affidavit upon which the warrant was based did not allege a sale of intoxicating liquors, a requirement mandatory under the National Prohibition Act, but not required by the Alaska dry act. The court again held both acts in force in Alaska,

> "with the qualification that if there are inconsistencies in any of their provisions, the National Prohibition Act must prevail."

In making this last statement the court must have known the penalties for nearly all offenses denounced by the Alaska dry act are more drastic than the penalties for similar offenses under

the National Act. It is apparent, however, the court considered the difference in penalties not an inconsistency sufficient to effect a repeal of the Alaska act, for in the Berkness case the court said:

> "The inconsistency which will nullify the law applicable to the local territory must be one concerned with the main purpose of the National Act, so that its effect upon a right conferred or restriction declared will be to diminish or relax either. Intoxicating liquor, by permit, may be possessed under the terms of either act for certain purposes. Under neither act may intoxicating liquor be otherwise possessed."

The court then held that warrants under the Alaska act for search of private dwellings must conform to the limitation placed upon search of private dwellings by the National Act.

The case went to the Supreme Court, U. S. v. Berkness, 275 U. S. 149,155. The Supreme Court said:

> "The court below held that by the legislation subsequent to the Act of February 14, 1917, (Alaska Bone Dry Act) Congress impased 'a limitation on the right to search a private dwelling which is available to residents of Alaska equally with those in other portions of the United States'; and we approve that conclusion . . . The emphatic

> declaration that no private dwelling shall be searched except under specified circumstances, discloses a general policy to protect the home against intrusion through the use of search warrants . . . The provision of the earlier special Act is hostile to the later declaration of Congress and must give way."

From the language used in the Berkness case, in this court and in the Supreme Court, the conclusion seems irresistible that inconsistency between the two acts, to effect a repeal, must be considerably more than a difference in penalties for similar offenses denounced by both acts. The inconsistency which will nullify the Alaska Act, "must be one concerned with the main purpose of the National Act," as said by this court; inconsistency in a general policy of the National Act, as said by the Supreme Court.

Counsel furnishes us an illustration of such an inconsistency with the main purpose or general policy that would effect repeal at pages 13 and 14 of defendants' brief, where is said:

> "Suppose there was a special (i. e., a local) statute of Congress allowing and licensing the sale and manufacture (and therefore the possession) in Alaska of whisky, wine and beer; and while this act is in full force Congress passes an act forbidding the manufacture and/or sale and/or possession of liquor and provides therein that said act shall apply to all the territory subject to the jurisdiction

> of the United States, could there then be any question that the former licensing act was repealed?"

The difference between the penalty provided for illegal possession of intoxicating liquor in violation of the Alaska dry act and that provided for the illegal possession of intoxicating liquor under the National Act, is far short of being such an inconsistency as is found in the illustration. Difference in penalty is not an inconsistency concerned with the main purpose, or general policy, of the National Act, as contemplated in the decisions of this court and of the Supreme Court; therefore the penalty provided by the Alaska Act for illegal possession of intoxicating liquor is not repealed by the National Act.

CONCLUSION

Appellee respectfully contends:

1. That the appeal ought to be dismissed for want of appellate jurisdiction; and the judgment of the trial court affirmed.

2. That the Alaska Bone Dry Act, and the penalty therein provided for illegal possession of intoxicating liquor, is not repealed by the National Act; and defendants' conviction for violation of the Alaska dry act ought to be affirmed.

Respectfully submitted,

HOWARD D. STABLER,

United States Attorney.